IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 724

BENARD SOUTH and HAROLD C. FLEMING
Plaintiffs-Appellants,

vs.

JAMES PETERS as Chairman of the GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE: MRS. IRIS BLITCH, as Acting Secretary of the GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE: THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE: THE GEORGIA STATE DEMOCRATIC PARTY: and BEN W. FORTSON, JR., Secretary of State of Georgia.
Defendants-Appellees.

Appeal From the District Court of the United States For The Northern District of Georgia Atlanta Division.

APPELLANTS' MOTION TO ADVANCE AND EXPEDITE THE HEARING AND DISPOSITION OF THIS CAUSE.

and

BRIEF IN SUPPORT THEREOF

HAMILTON DOUGLAS, JR.,
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MORRIS B. ABRAM,
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ERRATA

Movants strike Paragraph 2(a) on Page 5 of printed Motion, in view of the fact that Appellee's Statement in Opposition to Jurisdiction has already been filed.

NOTICE AND PROOF OF SERVICE

Please take notice that on ~~21st~~ 3rd day of ~~March~~ April, 1950, or as soon thereafter as the convenience of the Court will permit, we shall present to the United States Supreme Court in Washington, D. C., in the above-entitled cause, a Motion to Advance and Expedite the Cause and a Brief in Support Thereof, a copy of which is served upon you herewith. At which time you may appear or be represented by counsel if you so see fit.

HAMILTON DOUGLAS, JR.
MORRIS B. ABRAM
Attorneys for Plaintiff-Appellants

Received true and exact copies of the Motion to Advance and Expedite the Cause and a Brief in Support Thereof and of this Notice and Proof of Service this.....day of March, 1950.

EUGENE COOK
Attorney-General, State of Georgia

B. D. MURPHY
Atlanta, Georgia

C. BAXTER JONES
Macon, Georgia

M. F. GOLDSTEIN
Atlanta, Georgia

M. H. BLACKSHEAR, JR.
Asst. Attorney-General, State of Georgia

AFFIDAVIT OF SERVICE

....., being duly sworn, deposes and says that he is one of the Attorneys for Appellants in the above entitled cause, that he gave notice of the Motion to Advance and Expedite the Cause by sending on March 18, 1950, a telegraphic notice of said Motion to each attorney of record and by depositing on March 18, 1950, in a United States Mail Box in the City of Atlanta a copy of said Motion addressed to each of the attorneys of record.

.....

Subscribed and sworn to before me by.....

....., who is to me personally known,

this.....day of March, 1950.

.....

Notary Public

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APPELLANTS' MOTION TO ADVANCE AND EXPEDITE THE HEARING AND DISPOSITION OF THIS CAUSE.

BASIS OF MOTION

This motion is made in accordance with Rule 20, paragraph 3, of the Rules of this Court.

PURPOSE OF THIS MOTION

On June 28th, 1950, near the date when this Court customarily adjourns for the Summer recess, the Democratic Party of Georgia is planning to hold a primary for statewide offices. Candidates successful in that primary will, if the unvarying practice of more than 75 years holds true, serve as Governor of the State, United States Senator from the State, and in many other offices including the highest judicial posts.

The primary will be conducted by the County Unit System of consolidating votes. This means that after the ballots of all voters are cast and counted, the results of the primary election will be determined by the defendants giving effect to the law under constitutional attack. (Georgia nominations by County Units Act of August 14, 1917, Georgia Laws 1917, pp. 183-189.) Under this law the defendants will determine the outcome of the primary by diluting the votes which plaintiffs intend to cast. By this arbitrary method the defendants will count the votes in Chattahoochee County, Georgia, as being worth perhaps 122 times as much as the votes of plaintiffs. In 45 Counties of Georgia voters will be accorded twenty or more times the voting influence of plaintiffs. On a state average, voters outside Fulton County will be given 11.5 times more franchise than the plaintiffs.

No basis in experience, practicality or necessity supports the gross discrimination against plaintiffs which is vividly portrayed in the dissenting opinion below: "The vote of a citizen living on one side of Moreland Avenue in Atlanta,

DeKalb County, equals five of his neighbors directly across the street in Atlanta, Fulton County."

The system discriminates to a less degree against the voters of every single county in the state save those who live in the smallest county of all.

This discrimination complained of is not in reference to representation, but in the fact that having been permitted to vote for an officer on the same basis as all other citizens, and after the votes are counted, the defendants will deliberately and arbitrarily discount the value of plaintiffs' votes. Citizens of no other State in the Union are victimized by a County Unit System. This case presents a matter *sui generis*. *generis*.

TIMING OF THE SUIT

The bill below was for a declaration and injunction declaring the discrimination against plaintiffs to be unconstitutional and preventing the defendants from employing the County Unit System in *consolidating returns*, determining victorious candidates, and in certifying them as such. No injunction was sought against holding a primary election nor attempting to overturn the results of one already held.

The bill was filed January 25th, 1950, at the first indications that a primary would be called, but actually six weeks before the call. (Under Georgia law no primary need actually have been held.) When the bill was filed, statute required that if a primary were held it must occur on September 13th, 1950. But after the filing of this suit, the Administration recommended and the Legislature enacted a revision of the law permitting the Party Executive Committee to choose an earlier date. That Committee met on March 11, 1950, and pushed the primary forward almost three months, so it will now be held on June 28th, 1950.

Unless the Court grants a motion to advance, these plaintiffs cannot possibly have a final adjudication of their constitutional rights to have their votes properly valued in the pending primary. A prior attempt to void the county unit law was dismissed by this Court on account of mootness (*Turman* v. *Duckworth*, 329 U. S. 675). Plaintiffs are pursuing now the course recommended in the District Court decision in the *Turman* case in the sense that they brought their bill before the primary. Indeed, they have not awaited the call of the primary as specifically recommended in the *Turman vs. Duckworth*, 68 F. Supp. 744, 747, but ran the risk of prematurity by instituting suit even before the primary was called.

As primaries have always been held in Georgia in the summer or fall, it is improbable that any relief against the deprivation of plaintiffs' rights can ever be afforded in this Court without an advancement of the case.

To be effective, relief in this case will be needed before June 28th, 1950 (unless the defendant Committee again advances the primary date). But no relief is required until the actual day of the primary election. For the only relief sought is to prevent the consolidation of votes and the declaration and certification of the results of the election on the county unit basis.

THIS MOTION

This motion is for such order of this Court as will advance and expedite the hearing and decision of this cause in light of the emergency which the case presents. Specifically appellants move:

(1) That this case be docketed in order that it may have a hearing at the present term of this Court.

(2) That the time permitted by the Rules of this Court for accomplishing the following steps be constricted so as to afford a decision from this Court which can be known and enforced before the Democratic Primary in Georgia scheduled to be held June 28th, 1950:

(a) The time permitted under paragraph 3 of Rule 12 for filing of a statement in opposition to appellants' Statement of Jurisdiction.

(b) Time permitted by paragraph 3 of Rule 7 for filing of a brief in opposition to any motion to dismiss the appeal.

(c) Time permitted under paragraph 1, Rule 27, for filing appellants' brief.

(d) Time permitted under paragraph 4 of Rule 27 for filing appellees' brief.

(3) That the case here pending should be advanced for argument ahead of the order in which it might normally be assigned for hearing and decision in this Court.

(4) That the printing of the Record in this case be expedited to prepare it for an advanced hearing, or in lieu thereof that the appeal be heard on the typewritten record certified to this Court by the Clerk of the District Court.

CONSTITUTIONAL QUESTIONS PRESENTED

This case presents to the Court three constitutional questions:

(1) Whether, considering the provisions of the "Equal Protection Clause" of the 14th Amendment, it is allowable for a State arbitrarily to dilute the ballots

of fully qualified voters so that some persons voting for the *same* candidates as plaintiffs are accorded 122 times the voting power of the plaintiffs, and all other voters, on a statewide average, are accorded 11.5 times the voting influence of plaintiffs in electing *that candidate*. Whether this discrimination is justified by an historic antagonism against urban centers and a fear of Negro, progressive and labor votes in those centers; and whether geography of residence is a permissible basis for dilution of one's ballot.

(2) Whether the abridgment of a voter's right to choose a United States Senator by gross dilution of his ballot is a violation of a Privilege and Immunity of a Citizen of the United States within the meaning of the 14th Amendment.

(3) Whether the choice by County Units of a United States Senator in the Georgia Democratic Primary is a violation of the 17th Amendment to the Consitution of the United States, guaranteeing to plaintiffs the right to choose Senators by a vote of the people.

COURSE OF PROCEEDINGS BELOW

The complaint seeking injunctive and declaratory relief was filed on January 25, 1950. The case was originally assigned for hearing on Febfuary 17th, 1950, before a three-judge court. The hearing was postponed at the request of Counsel for the Appellees and the trial was held on February 24, 1950. At the conclusion of the hearing, Counsel for plaintiffs submitted a brief. Counsel for defendants requested two weeks for filing their brief. The Court allowed but one week. On March 15th, the decision of the Court was announced. The majority denied all relief sought,

but one judge, dissenting, held that plaintiffs were entitled to injunctive and declaratory relief on all the constitutional grounds urged. Two days after the entry of the final order in this cause, plaintiffs filed their appeal.

WHEREFORE, appellants pray that this their motion to advance be inquired into by the Court and the relief herein specifically sought be granted.

Respectfully submitted,

HAMILTON DOUGLAS, JR.
MORRIS B. ABRAM
Attorneys for Plaintiffs-Appellants

BRIEF IN SUPPORT OF THE MOTION TO ADVANCE

INTRODUCTION

The nature of the case and the questions presented are set out in the motion herein. A fuller presentation of the same is to be found in plaintiffs' Statement of Jurisdiction.

ARGUMENT

I.

What this Case is Not

This is not a *Colegrove v. Green* (328 U. S. 549) situation. There is no necessity for this Court to remap the State politically; no question of interference with Congress' power to control the manner of holding elections; no claim of wrong against a state as a polity; no remedy sought against unequal representation of a county in the legislature. Plaintiffs in this case complain that they are not being allowed an equal vote with every other voter who is to be governed by the successful candidate. In the *Colegrove* case, each voter had an equal voice in determining the candidate who was to represent *him*.

This is not a case like *MacDougall v. Green* (335 U. S. 281). The relief sought here will not interrupt a pending election so as to invalidate absentee and soldier vote ballots. The injunction prayed would in no way interfere with any stage of the voting and in fact would become operative only at the stage where the defendants proceeded to dilute the effectiveness of the whole ballots which the plaintiffs are permitted to cast and which are required by law to be counted. Relief sought would disfranchise none but would enfranchise all equally.

Furthermore, *the degree* of discrimination in the *MacDougall* case (which is thought to be of some decisiveness in the holding) does not remotely approach the situation

against which these plaintiffs seek relief. On the facts of the *MacDougall* case, this Court held: "... the State is entitled to deem *this* power not *disproportionate*." (Emphasis supplied.) As related to Cook County, the facts in the *MacDougall* case showed that 61% of the *political initiative* could come from the subdivision with 52% of the population. But these plaintiffs show this Court that (NOT AS A MATTER OF POLITICAL INITIATIVE) but in the actual choice of state officers in the only effective election, they are practically disfranchised as compared to citizens in other counties.

There may be some reasonable basis for the requirement in the *MacDougall* case that political initiative spring from a source wide enough to prevent the splintering of the electorate. But the County Unit System does not purport to deal with that problem. The *raison d'etre* of the County Unit System is the same as its effect: To discriminate against plaintiffs and other urban voters.

In the dissenting opinion filed below in this case, Judge Andrews notes another difference with the *MacDougall* case: "... proportionately no more city folks vote [in Georgia Democratic primaries] than do country people. This disposes of the notion, tacitly approved in *MacDougall v. Green*, that difficulty in getting to the polls should be recognized here as a makeweight in justifying a rank discrimination based on place of residence."

This is not like *Turman v. Duckworth* (329 U. S. 625). This case is not now moot. The primary is scheduled for June 28, 1950. Nor does the pending case ask the Court to upset an election already held.

Plaintiffs are not attaacking the right of Georgia to establish the qualifications requisite for electors within the State. Plaintiffs are, however, insisting that once Georgia

has established the criteria for qualifications of an elector, all who qualify must be treated equally. Plaintiffs are not attacking the Presidential Electoral College, nor the equal vote in the United States Senate. The Federal Government is in no way enjoined or commanded by the 14th Amendment. Plaintiffs are not attempting to use judicial power to correct malproportions in legislative representation. This Court is not being asked to juggle boundary lines and accommodate and adjust them to the influx of the new born and the efflux of the dead and the emigrant. Plaintiffs are merely asserting that one vote is not 122 votes and are requesting the Court to judicially declare that fact and grant injunctive relief upon it.

II.

What this Case is

There is but one County Unit System in the United States. The Tennessee Legislature attempted to foist the system on that state but the attempt was struck down by the Supreme Court of Tennessee in a unanimous decision applying some of the Constitutional principles urged here. (See *Gates v. Long*, 172 Tenn. 471, 113 SW (2) 388.) The Georgia County Unit System is purely and simply a deliberate method for disfranchising certain classes of citizens whose influence is thought to be pernicious.

The degree of discrimination is unparalleled and is indicated by some of the ratios already presented. Under the holding of the majority of the Court below the ratio of discrimination would be permissible state practice no matter how far it might be carried. Yet, can a Court of Equity which is zealous of the right of the franchise and the equality of its protection permit the virtual cancelling out of the ballot by indirection?

III.

Judge Andrews who dissented below thoroughly weighed the balance of convenience which historically has determined the issuance of equitable relief. His conclusion was that the injunction would be practical, effective and easy of enforcement. He well summarized the consequences of the issuance of the decree:

> "I am unable to find any unpalatable practical consequences to the granting of an injunction in this case. There will be no necessity for this Court to supervise any election, an eventually upon which GILES v. HARRIS turned. The gross discrimination wrought by the offending statute occurs after the votes have been cast and counted by a method employed by the State Democratic Executive Committee and its chairman and secretary. The effective application of the discrimination to the plaintiffs occurs when the nominees are placed on the general election ballot by the Secretary of State. All of these instruments of discrimination are defendants here and an injunction forbidding their actions under the offending statute will effectively end the discrimination. The relief granted in RICE v. ELMORE, supra, required of the Court vastly greater supervision of the electoral process than is asked or required in this case.
>
> "Granting of injunctive relief will not bring about any of the practical consequences feared by the Court in COLEGROVE v. GREEN, supra. No disruption of a pending election will ensue. The only change which will be effected is the method of consolidating the vote at the top level of the Georgia Democratic Party. The votes will be cast and counted in precinct, ward and county without change or interruption. The Georgia General Assembly need take no action to provide an

alternative method of determining nominees, for under Georgia law the responsibility will revert to the party. Defendants in argument and brief have relied heavily upon two other suits which involved attacks upon the Georgia County Unit System, TURMAN v. DUCKWORTH, 68 F. Supp. 744, and COOK v. FORTSON, 68 F. Supp. 624, both decided in 1946 by this Court. The Supreme Court of the United States dismissed appeals on the grounds of mootness, citing UNITED STATES v. ANCHOR COAL COMPANY, 279 U. S. 812. TURMAN v. DUCKWORTH, 329 U. S. 675.

"These cases have no application to the case at bar. The District Court in each case based its decision on COLEGROVE v. GREEN, supra. As discussed above, that case is authority only for the discretionary power of equity to deny relief under the circumstances of that case. In the earlier county unit cases, the plaintiffs sought to overturn a completed primary election after they had participated in the primary without objection, on the grounds that candidates for whom they had voted received a plurality of votes cast in their respective contest but were not declared nominees of the party. The candidates themselves did not complain and one of them even went so far as to intervent to ask that the suit be dismissed.

"The consequences of injunctive relief in those two cases presented practical problems in the exercise of the Court's discretionary powers not perceivable in the instant case, and view in this light the District Court decisions in them are not precedent for denial of relief here."

IV.

Other Relief

There is no practical hope that the vicious discrimination against appellants can ever be remedied otherwise than through the intervention of this Court. The Georgia Legislature is composed so as to reflect precisely the discrimination of the county unit system.

This vast disproportion of legislative power in rural counties (for which plaintiffs seek no relief) insures that the County Unit System will endure. Indeed, the last General Assembly by the required 2/3 vote proposed, and there is being submitted to the people in the General Election of November, 1950, a constitutional amendment to extend the County Unit System into future General Elections.

As legislative relief is hopeless, so is constitutional relief through amendment. All constitutional initiative lies with the legislature—with 1/3 of either house able to stifle any proposal.

So even if the people strongly will the end of the County Unit System, they are powerless to accomplish it.

V.

Implications of the County Unit System

Since *Smith v. Allwright*, 321 U. S. 629, many Southern legislatures have been groping for a means of keeping the Negro disfranchised. These attempts have been recorded in a steady stream of decisions. In Alabama the Boswell Amendment was the method of attempted circumvention. The effort was ill-fated. *Davis v. Schnell*, 81 F. Supp. 872. South Carolina made two tries. Both failed. *Elmore v. Rice*, 72 F. Supp. 516, aff. 165 Fed. (2) 387, cert. den. 338 U. S. 875; *Brown v. Baskin*, 78 F. Supp. 933.

Georgia had hopes. These were dashed in *Chapman v.*

King, 62 F. Supp. 639, aff. 154 F. (2) 460. But Georgia still has in the County Unit System a most effective and, so far, the most constitutionally promising method of Negro disfranchisement. It was argued below, and indeed the fact is judicially known and cannot be disputed, that in Georgia the Negro in the small rural county is, through intimidation, threats, economic reprisal and occasional lynchings, prevented from voting in any numbers. (In Wrightsville, Johnson County, Georgia, four hundred Negroes were registered to vote in a local primary in 1948. The night before the primary a Ku Klux Klan parade was held and a cross burned on the Court House lawn. Not one Negro voted the following day.) In the cities the Negroes do vote. But these votes, like white city votes, are sterilized by the County Unit System. The County Unit System thus "heavily disfranchises the Negro population. Almost half of Georgia's Negroes live in the most populous counties. Here the Negro vote has been large. But the County Unit System cancels the Negro vote in these counties—the only counties where the Negroes have been able to vote in important numbers. In small counties, where any single vote is at a premium, Negroes generally have been denied the franchise." *New South* published by the Southern Regional Council, Atlanta, Ga., Vol. 4, Nos. 5&6, 1949.

The same point was referred to in the hearing below by expert witness, Doctor Linwood Holland, Associate Professor of Political Science of Emory University, Atlanta, Ga., and author of *The Direct Primary in Georgia*, published by the University of Illinois Press:

> "... your Negro vote is predominately in your urban areas, it means he would be prevented."

If the Georgia County Unit System is permissible state practice, it will come to replace the white primary as the

instrument of Negro disfranchisement throughout those areas of the South which are still determined to find a means of preventing the black man from voting.

The Chattanooga (Tenn.) Times lead editorial of March 16, 1950, in commenting on the decision below in this case, summed up these implications of the County Unit System:

> "But the U. S. Supreme Court is likely to consider it from another viewpoint. The county unit system of Georgia is the last loophole remaining whereby the U. S. Supreme Court decision that there must be no discrimination because of race in Southern primaries is defeated.
>
> "In the Georgia rural counties, Negroes theoretically have the right to vote, but they are intimidated and in many cases they dare not exercise their right.
>
> "The danger is that if this loophole remains, the same technique may be copied in other states to invalidate the U. S. Supreme Court decision. . . .
>
> "At any rate, a U. S. Supreme Court ruling on the county unit system is of importance to the whole South, for the county unit system discriminates not only against city voters in Georgia, but it is the system by which the Supreme Court ruling on the right of all citizens to vote is dodged."

VI.

Precedents for Granting the Motion to Advance

This is a case, of public gravity and importance. In other cases this Court has granted and disposed of cases on motions to advance as provided in the Rules of the Supreme Court.

In *MacDougall v. Green, supra,* the Motion to Advance was served on Counsel opposite on October 12th, 1948, the

cause was argued on October 18th and the decision rendered three days later.

In *Wood v. Broom*, 287 U. S. 1, an appeal was filed in this court on October 2. Briefs were submitted on October 11 and oral argument was heard on October 13. The Court announced its decision on October 18.

In *McPherson v. Blacker*, 146 U. S. 1, a motion to advance the cause was filed on the second day of Term, October 11, and was granted at once. The cause was heard on that day and the decision rendered on October 17.

Plaintiffs respectively submit to the Court that there are the most compelling reasons for granting this Motion to Advance, and they earnestly pray that their motion be favorably considered.

PRAYER OF THE MOTION

For the reasons indicated above, appellants respectfully move this Court for such order of this Court as will advance and expedite the hearing and disposition of this cause at the earliest time convenient to this Court.

Respectfully submitted,

HAMILTON DOUGLAS, JR.
MORRIS B. ABRAM
Attorneys for Plaintiffs-Appellants